June 25, 2012

Ex Parte Letter

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Special Access Rates for Price Cap Local Exchange Carriers,
WC Docket No. 05-25

Dear Ms. Dortch:

On its website, the Commission states: "Data underpins every activity" at the FCC, and that "ensuring the openness of data . . . is a key dynamic in fulfilling Chairman Genachowski's pledge to be a fact-based, data-driven agency.[1] If the Commission were to adopt a recently circulated order suspending consideration of pricing flexibility for special access services, it will have defaulted on this pledge to make decisions based on facts and data. It will also have signaled to the world that refusing to submit data to the Commission in an open and transparent manner is the surest way to get what you want.

That would be a disastrous precedent for an agency intent on instilling confidence in its role as an impartial expert. The FCC should not grant relief to parties who refuse to provide sufficient information to support a credible finding that relief is necessary. If the FCC is unable to obtain the information it requires, it should either (1) deny the requested relief or (2) issue mandatory data requests to obtain that information and, to the maximum extent possible, make it publicly available.

If the FCC instead acts (1) without sufficient data, (2) without attempting to use the authority Congress gave it to secure such data, and (3) without opening the data it has received to public inspection, it leaves the public with an impression that the FCC is hiding something. Dumping over 10,000 pages of largely irrelevant material into the record *after* the draft order has been circulated will not dispel the appearance of impropriety in this matter, especially when the FCC's action would constitute a *de facto* ruling on pending petitions subject to a statutory deadline.

[1] See http://www.fcc.gov/data.

The suspension of the rules for an indefinite period is, in effect, the same as their repeal. The FCC has been unable to obtain the data necessary to make a decision even when the petitions in this proceeding had an incentive to provide it, i.e., because they desired the reregulation of special access pricing. That incentive would be eviscerated by the proposed order barring future pricing flexibility petitions, because regulated special access pricing would again be the default rule in all markets that are not already subject to pricing flexibility. The proposed order would thus make it even *more* difficult for the FCC to obtain the data it needs to make a reasoned decision on the issue.

It would also reduce the incentive of service providers to deploy broadband class facilities by artificially lowering the price of narrowband facilities. Delayed investment in broadband facilities might improve certain service provider's cash flows and lower their near-term capital expenditures, but it would not serve the goals of the National Broadband Plan. If the United States is serious about promoting *broadband* deployment, the United States should stop subsidizing the price of 1950's-era *narrowband* services.

There is no data supporting a freeze

There is no question that the FCC lacks adequate data to make a credible finding supporting across-the-board price regulation of special access services. On October 6, 2011, in Case Number 11-1262, the Federal Communications Commission made the following representation to the United States Court of Appeals for the District of Columbia Circuit:

> While the agency has made progress toward building a sufficient evidentiary record, its efforts have been impeded by the failure of some parties to produce information clearly documenting their claims that special access rates are unreasonable.[2]

The FCC complained to the court that it had been unable to make a decision because only eight percent (8%) of COMPTEL[3] members had responded to the Commission's requests for data.

The data that has been submitted by service providers is not open to the public

The data that is available to the Commission is not open to the public. Most of the submissions that were made in response to the FCC data request issued in September 2011 are labeled "confidential" and have been redacted from public inspection in their entirety.

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[2] Letter from Glenn T. Reynolds, US Telecom, to Marlene Dortch, Secretary, FCC, filed in WC Docket No. 05-25 (June 14, 2012), attachment at p. 2 (also available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310255A1.pdf).

[3] COMPTEL's membership includes many of the parties who have been the most active in this docket. See: http://www.comptel.org/memberlist.asp?contentid=2109.

Because the FCC has not made a redacted version of these filings publicly available, it is impossible to determine whether these filings were responsive to the FCC's request at all. For all the public knows, these submissions may consist of a single paragraph saying that the company does not intend to submit any data. The lack of transparency in this proceeding denies civil society a meaningful opportunity to participate in the decision-making process.

After the order was circulated, the Commission attempted to bolster the record by announcing publicly available materials comprising over 10,000 pages.[4] The volume of this material is impressive, but most of it is completely irrelevant to the current level of competition in special access services. It includes law review articles dating back to the early 1980s, historical texts, and merger guidelines from international agencies around the world. What it does *not* include is comprehensive data concerning special access deployments and availability in the United States. Competition theories are hardly a substitute for market data. The emphasis on theoretical materials in a response intended to mitigate a self-acknowledged lack of adequate facts and data merely serves to highlight the inadequacy of the FCC's market information in this case.

The FCC has always had the ability to obtain the necessary data

Aggrieved parties are generally required to exhaust all administrative remedies before seeking judicial relief. The rationale for the doctrine of exhaustion of administrative remedies is that agencies have specialized personnel who should have an opportunity to resolve disputes arising under their jurisdiction before the court intervenes. In this instance, the FCC is proposing to act before it has exhausted its own remedies for obtaining the data it lacks.

The FCC has broad authority to correct the deficiencies in its record. The FCC can exercise subpoena power pursuant to Section 409 of the Act.[5] The FCC can also compel regulated entities to submit accurate information upon request without issuing a subpoena:

> In sections 4(i), 4(j), 218, 403, and 208 of the Act, Congress afforded us with broad authority to investigate regulated entities. This broad investigative authority in these sections individually and collectively encompasses the authority to obtain from carriers information supported by attestations to ensure that the information is accurate and truthful.[6]

Thus far in this proceeding, the FCC has repeatedly chosen to ask for voluntary cooperation rather than the mandatory submission of information. When voluntary measures fail, the appropriate response is to compel participation or deny the requested relief.

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[4] *See* Public Notice, DA 12-873 (WC, Jun. 5, 2012).

[5] 47 U.S.C. § 409.

[6] SBC Communications Inc., Liability for Forfeiture, *Forfeiture Order*, FCC 02-112 at ¶ 6 (2002).

In the order on circulation, the FCC instead intends to impose obligations on parties that have responded to the FCC for the *benefit* of parties that have disregarded the Commission's fact-finding process. Rewarding that behavior would set a disastrous precedent for the agency's fact-finding efforts. If the draft order becomes law, the FCC should not expect meaningful responses to voluntary requests for data in the future.

A freeze is a *de facto* decision in pending matters

The freeze order is clearly decisional in nature. There are currently several petitions for pricing flexibility pending before the agency that would be dismissed as a result of the freeze.[7] The freeze would thus dismiss the petitions by deciding not to decide them. That is not an appropriate basis for decision by an expert agency.

A freeze would discourage broadband deployment

The most pernicious impact of a freeze on special access is that it would discourage investment in broadband infrastructure. For example, in recent ex parte meetings urging the FCC to adopt the freeze, Sprint said that, despite its Network Vision broadband initiative, narrowband special access would "continue to be critical" to its wireless operations.[8] In other words, Sprint would like to have access to price-regulated narrowband services in areas where it would prefer to avoid expending capital to upgrade its wireless infrastructure to broadband. Why would the FCC support continued reliance on narrowband facilities for an indefinite period when Congress directed the FCC to "develop a National Broadband Plan to ensure every American has 'access to broadband capability'"?[9] If the Commission cannot answer that question, it should not adopt the proposed freeze order.

Pursuant to the Commission's rules, please include this letter in WC Docket No. 05-25.

Sincerely,

/s/

Fred B. Campbell, Jr.
Director

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[7] Letter from David Lawson, AT&T, to Marlene Dortch, Secretary, FCC, filed in WC Docket No. 05-25 (June 14, 2012).

[8] Letter from Christopher Wright, Wiltshire Grannis LLP, to Marlene Dortch, Secretary, FCC, filed in WC Docket No. 05-25 (June 15, 2012).

[9] National Broadband Plan (http://www.broadband.gov/plan/executive-summary/).